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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

KAISER ENGINEERS,
DIVISION OF HENRY J. KAISER COMPANY; and
SERGENT HAUSKINS & BECKWITH,
Petitioners,

VS.

ALLENDALE MUTUAL INSURANCE COMPANY,
a Rhode Island corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

A. Was the district court correct in dismissing a declaratory relief action brought by an insurance company, openly alleging that it wanted limitations protection for a potential future subrogation claim, and which was thus seeking a present declaration that its possible future claim would be valid if and when it subsequently ripened?

B. Does it solve any of the jurisdictional or policy problems with such a suit to hold, as the court of appeals did in reversing the dismissal, that "the district court will normally abate the proceedings" until the ripening (if ever) of the insurer's potential subrogation interest?

C. As this particular insurer also had the opportunity to assert its subrogation theories against the petitioners in a prior state-court litigation involving the identical subject matter, do not strong principles of federal/state comity and federal judicial administration further support the district court's dismissal of this action?[1]

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[1] This issue is closely related to a case currently pending in this Court on a petition for certiorari, *Gulfstream Aerospace Corporation v. Mayacamas Corporation*, No. 86-1329, 55 U.S.L.W. 3587, which involves the application of these same principles to a motion to stay federal proceedings when removal had been available to the plaintiff in its capacity as the defendant in an identical state case.

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PARTIES

The only parties to the proceeding below are those noted on the caption to this petition.[2]

OPINIONS BELOW

The opinion below, certified for publication, is reprinted as Appendix A. The district court's memorandum opinion and order is reprinted as Appendix B.

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[2] Pursuant to Supreme Court Rule 28.1, there are no parent or other affiliated companies of the petitioning corporation.

SUPREME COURT JURISDICTION

The opinion of the Court of Appeals was filed on November 6, 1986. petitions for rehearing were filed on November 20, 1986, and were denied by order filed on January 2, 1987. (Appendix C) Jurisdiction for this petition is conferred by 28 U.S.C. § 1254(a).

STATUTE INVOLVED

28 U.S.C. § 2201(a)

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the International Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

Petitioner, Kaiser Engineers, Division of Henry J. Kaiser Company ("Kaiser"), was named as a defendant in a complaint filed on July 15, 1983, in the United States District Court for the District of New Mexico. The complaint was filed by respondent Allendale Mutual Insurance Company ("Allendale").[3] Also named as a defendant was Sergent Hauskins & Beckwith ("Sergent").

Allendale's complaint involved a July 16, 1979 dam failure, causing extensive losses to its insured, United Nuclear Corporation ("UNC"). Allendale denied any policy coverage, and was sued by UNC in a New Mexico state court. No party ever attempted to implead Kaiser or Sergent, although they had provided engineering services for the dam.

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[3] A second plaintiff, Appalachian Insurance Company, has since dismissed all its claims voluntarily.

In May 1983 UNC obtained a judgment against Allendale, but Allendale timely appealed it and never made a payment. Thus, as Allendale forthrightly alleged in its instant federal complaint:

> There is presently no way of knowing or determining whether Allendale . . . will ultimately be obligated to pay to UNC all or any part of UNC's losses arising out of the failure of its dam. (¶ 5)

With that admittedly speculative basis for a subrogation lawsuit, Allendale was again forthright in its allegations on the reasons for filing it:

> 6. Defendants herein [Kaiser and Sergent] . . . may be liable to UNC in contract or tort for the damages suffered by UNC as a result of the failure of the said dam. *In the event* Allendale or Appalachian become obligated to pay any monies to UNC . . . they *will become subrogated* . . . to any claims UNC might have against defendants. (Emphasis added)

It was one day before the fourth anniversary of the UNC dam failure. Allendale's complaint went on as follows:

> . . . If the parties hereto await the ultimate determinations of the New Mexico courts on the question of the liability of Allendale and Appalachian under their said insurance contracts, the statutes of limitation will or may have run barring plaintiffs' *potential* subrogated claims.
>
> 7. Accordingly, *and to avoid the bar,* plaintiffs herein allege . . . that the said defendants are liable to UNC for UNC's losses. (Emphasis added)

Sergent and Kaiser both moved to dismiss this unusual complaint on the grounds described in this petition. The response was revealing. In addition to an opposition brief, Allendale filed a "Motion for Indefinite Stay," the heart of which was as follows:

> In the event that Allendale and Appalachian are both determined not to be liable to UNC the issues raised in the complaint in this action will become moot and should be dismissed. On the other hand, should either of the plaintiffs

> be found liable after conclusion of the appellate procedure in the New Mexico State Courts, this subrogation suit *will become ripe for decision* and should proceed. (Emphasis added)

The Tenth Circuit Court of Appeals later endorsed that approach, holding that "the district court will normally abate the proceedings. . . ." (Appendix, p. A-5) In other words, Allendale type suits may be filed and then filed away, waiting for the day, if ever, that they "become ripe for decision."

The district court disagreed. In a memorandum opinion and order filed on November 21, 1983 (Appendix B), Senior United States District Judge Edwin L. Mechem concluded as follows:

> The plaintiffs may have rights to assert against the defendants at some future date, however, there is no actual controversy at this time. (Appendix, p. A-8)

The defendants' motion was accordingly granted on the basis of a lack of jurisdiction, and the motion for an indefinite stay was naturally denied.

Allendale and Appalachian timely appealed to the Tenth Circuit on December 20, 1983. Appalachian was dismissed as a party, by stipulated order, on May 3, 1984.

Allendale adhered to its views about the nonripeness of this case on the appeal, too. Briefing had concluded on June 8, 1984. On June 11, 1985, the Tenth Circuit sent out its notice scheduling oral argument for August 6, 1985. Allendale moved to postpone it (see Appendix D), because the New Mexico state appeal on the UNC/Allendale matter had still not concluded:

> A decision in the principal case will potentially moot the issue before the Court and make oral argument unnecesssary. (Appendix, p. A-10)

Allendale said nothing, of course, about why the federal courts should be involved at all, unless and until "the principal case" resulted in some interest that Allendale might properly assert.

Oral argument proceeded as scheduled on August 6, 1985. Then, on October 15, 1985, "the principal case" was finally

decided by the New Mexico Supreme Court. *United Nuclear Corporation v. Allendale Mutual Ins. Co.*, 103 N.M. 480, 709 P.2d 649 (1985), *rehearing den.*, December 5, 1985. A substantial award against Allendale was affirmed. So Allendale promptly mailed a copy of the opinion to the clerk of the Tenth Circuit, advising that "the judgment is now therefore final." (See Appendix E)

The Tenth Circuit handed down its opinion on November 6, 1986. The court recognized that Allendale had "commenced this declaratory judgment action because it feared the four-year New Mexico statute of limitations . . . ." (Appendix, p. A-2) But it regarded Allendale's predicament as a circumstance supporting the availability of a federal forum: "a clear need exists for the present action. . . ." (*Id.* p. A-5)

The court likewise recognized that Allendale could have avoided its predicament, by asserting its subrogation theories in its prior litigation with UNC in the New Mexico state court. (*Id.*, p. A-5, fn. 2) But it regarded that choice as an "optional" one, and saw "no reason to punish Allendale" by denying it a federal declaratory relief forum. (*Id.*) The opinion contains no discussion of "the interrelationship of the state and federal courts in the administration of the Federal Declaratory Judgments Act. . . ." *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494 (1940), although Kaiser had strongly emphasized that issue in its brief and argument.

ARGUMENT

A. THE TENTH CIRCUIT HAS OPENED THE DOOR TO INNUMERABLE DECLARATORY RELIEF SUITS BY INSURANCE CARRIERS ATTEMPTING TO PROTECT CLAIMS TO WHICH THEY HAVE NOT YET BECOME SUBROGATED, AND MAY *NEVER* BECOME SUBROGATED

The Tenth Circuit has created an "Allendale suit." It will have wide application.

Citing the insurance carriers' predicament when facing a statute of limitations on a potential future subrogation claim, the Tenth Circuit has issued a novel invitation. Though the insurers will have no present subrogation interest, and absolutely no practical incentive to prosecute a claim, the Tenth Circuit has invited them to file federal declaratory relief suits anyway, to solve their state statute of limitations problems. So that none need actually litigate such totally hypothetical disputes, the Tenth Circuit has also instructed the district courts to abate these lawsuits until needed (if ever).

Certiorari is not granted without "special and important reasons therefor." Supreme Court rule 17.1. The case must present an issue "beyond the academic or the episodic." *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74 (1955).

Consider, therefore, at the outset, how many insurance companies in this nation have potential future subrogation claims from year to year. Every one of those potential claims faces a statute of limitations, many of which are far shorter than four years. Every insurance carrier could file an Allendale suit in a federal court on every one of those claims. Diversity of citizenship would be the only limitation, and hardly a significant one given the interstate structure of the insurance industry.

In short, the Tenth Circuit has created a new remedy of tremendous potential impact on the federal courts. Moreover, that remedy is fundamentally at odds with Article III, with federal/state comity, and with "wise judicial administration," *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976), eschewing piecemeal litigation. The Allendale suit is quantitatively *and* qualitatively a disturbing prospect.

B. THE SEVENTH CIRCUIT HAS A SHARPLY CONFLICTING AND MUCH SOUNDER APPROACH IN MEETING INSURERS' NEEDS FOR DECLARATORY RELIEF AS TO THIRD PARTIES

The opinion below cites Seventh Circuit authority (see p. A-4), but that authority in fact sharply conflicts with the Tenth Circuit's holding in two fundamental respects. This conflict

makes certiorari all the more important. *See,* Supreme Court Rule 17.1(a).

In *Fidelity & Deposit Co. of Md. v. Sheboygan Falls,* 713 F.2d 1261 (7th Cir. 1983), a surety company filed a declaratory relief action against two towns which had employed a contractor assured by Fidelity on a performance bond. Also named as defendants were the contractor, and its several pertinent subcontractors. The towns had just made a $672,000 claim against the surety company on the performance bond. The surety company had indemnification rights against the contractor. Therefore, by its declaratory relief action, the surety company had brought into one court, for a single adjudication, every party that could conceivably share in the liability for the alleged loss. There was also a real and present dispute, precipitated by the towns' demand for a $672,000 payment.

The Seventh Circuit understandably approved Fidelity's use of the declaratory relief action, but the Tenth Circuit cannot draw on it as precedential support for Allendale's suit. The latter can point to no present controversy whatever. It also constitutes a piecemeal adjudication that is highly disruptive to federal/state comity. (See *post,* argument C)

The Tenth Circuit, attempting to justify its emphasis on Allendale's *need* for declaratory relief, cites limited excerpts from the following passage in *Fidelity:*

> Fidelity's invocation of the Declaratory Judgment Act, 28 U.S.C. § 2201, was wholly proper. The indemnity agreement gave it a potential claim of some magnitude against Scotty [its assured contractor], but a claim on which Fidelity could not realize unless and until it was found to have defaulted on its obligations under the performance bond. Fidelity may have been concerned lest passage of time prevent its recouping from Scotty any money it might have to pay the towns. Only by forcing the towns to bring their action on the bond could Fidelity crystallize its own rights under the indemnity agreement. This is the kind of interest that the Declaratory Judgment Act was intended to protect. *See, e.g., Illinois ex rel. Barra v. Archer Daniels Midland Co.,* 704 F.2d 935, 939-

> 40 (7th Cir. 1983). Joining Scotty as a defendant obviated any need to bring a separate suit to enforce the indemnity agreement in the event that Fidelity lost its suit against the town. (713 F.2d at 1265)

In the Tenth Circuit' s view, *Fidelity* supports the proposition that "the running of a statute of limitations may also create a need for an adjudication of contingent rights and duties." (p. A-4) The Tenth Circuit's opinion explained this as follows:

> The [*Fidelity*] court noted that the surety's action in seeking a declaratory judgment was apparently motivated by its concern that the passage of time would bar its right to seek indemnity for any amount it might have to pay the city. This, the court held, was "the kind of interest that the Declaratory Judgment Act was intended to protect."

Kaiser submits, respectfully, that the full passage in the *Fidelity* opinion, and the starkly dissimilar factual context of that case, raise insuperable obstacles to the Tenth Circuit's reliance on this Seventh Circuit authority. First, a litigant's motivation or unilateral need for judicial assistance plays the central role in the Tenth Circuit's analysis. By contrast, the Seventh Circuit only mentions the motive factor in passing. The "interest" protected by *Fidelity* was not that, but a single and comprehensive "crystallizing of rights" in a real and present controversy. *Fidelity*'s own citation to the *Archer Daniel Midland* case makes this undisputable.

Secondly, in the instant case, an appropriate forum for adjudication was available in the prior New Mexico state court proceedings. Unlike Fidelity, Allendale spurned that kind of comprehensive adjudication, preferring to take its chances on a piecemeal litigation with Kaiser and Sergent in the federal courts.[4]

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[4] If apparent motivation is indeed relevant, we note that the petitioner-engineers' presence in Allendale's litigation with UNC would have kept Allendale from hedging its bets by taking one position on the causation of the dam failure for the purpose of insurance coverage, and another position for the purpose of a subrogation claim against the

In sum, the Seventh Circuit's holding and rationale in *Fidelity* are irreconcilable with the Tenth Circuit's approval of Allendale's strategy.

C. THE TENTH CIRCUIT'S OPINION ALSO WARRANTS CERTIORARI BECAUSE OF ITS THREAT TO FEDERAL/STATE COMITY AND SOUND JUDICIAL ADMINISTRATION

The "Allendale suit" created by the Tenth Circuit is not merely an invitation to multitudinous premature suits by insurance companies. It is also a recipe for unjustifiable and offensive federal interference with state court proceedings *and* state substantive law. To meet insurance companies "needs" in this way, rather than by the Seventh Circuit's approach, is to sanction the worst kind of piecemeal litigation in the federal courts.

"Wise judicial administration" was the rubric under which this Court affirmed the dismissal of federal court proceedings in the leading case of *Colorado River Water Conservation District v. United States, supra,* 424 U.S. 800, where state court proceedings presented a fully competent and more desirable single forum for a water rights adjudication. Earlier, in *Brillhart v. Excess Ins. Co. of America, supra,* 316 U.S. 491, 495, this Court wrote as follows concerning a similarly unwise use of the federal declaratory judgment remedy:

> Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.

Certiorari had been granted in *Brillhart* "in view of the important question affecting the interrelationship of the state and federal courts in the administration of the Federal Declaratory Judgments Act. . . ." *Id.* at 494.

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engineers. Surely, bet hedging is not a legitimate use of the federal courts.

In the instant case, the "Allendale suit" represents a double affront to federal/state comity. First, it encourages piecemeal litigation in *both* forums, multiplying the chances of inconsistent judgments and conflicting interlocutory orders. This seems self-evident.

Secondly, and more ominously, the Allendale suit is a federal remedy openly designed for the purpose of helping parties avoid "problems" with state statutes of limitations. But Allendale was *meant* to have a problem with the New Mexico statute of limitations. As Allendale alleged, New Mexico's substantive law provided that the claims it wished to preserve must be validly asserted, if at all, within four years of accrual. How does it support federal jurisdiction to argue that Allendale's potential state law claim was thus facing extinction under the ordinary operation of state law? That circumstance properly militated *against* federal intervention. New Mexico's own courts and legislature were the appropriate bodies to provide relief, if it was needed, from New Mexico's limitations law. There was certainly no federal cloud over the validity of that law. The Allendale suit represents a markedly "gratuitious interference" with state substantive law, not just the state adjudicatory process.

The Allendale suit also overrides New Mexico state subrogation law contrary to *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). New Mexico only confers a subrogation interest when one "has paid the debt of another. . . ." *United States Fidelity and Guarantee Co. v. Raton Natural Gas Co.*, 86 N.M. 160, 431 P.2d 737 (1967). The Tenth Circuit, nevertheless, has ordered district courts sitting in New Mexico to entertain subrogation suits by parties who have no subrogation standing under New Mexico law.

D. CERTIORARI IS WARRANTED, IN SUM, TO MAINTAIN AN HISTORICAL AND WISE LIMITATION ON THE JURISDICTION OF THE FEDERAL COURTS

A remedy has been created, with the caveat that it not really be used. A lawsuit has been allowed, with the instruction that it be abated indefinitely. The red warning flag was waving vigorously here, but in vain.

Article III of the Constitution requires a "case or controversy." The declaratory judgment act likewise requires "a case or actual controversy". 28 U.S.C. § 2201(a). These short, well turned phrases are pregnant with American constitutional history, and sound concepts of the proper role of the judiciary—especially the federal judiciary. These phrases have a well known meaning: a fundamental opposition to the entertainment of requests for advisory opinions on hypothetical questions.

Allendale's complaint for declaratory relief openly acknowledged the lack of any present and real controversy with Kaiser or Sergent. Yet Allendale proposed to maintain a federal lawsuit against them, perhaps stored away for several years in a back room of the clerk's office.

In a vacuum, Allendale's proposal may seem harmless enough. Allendale could well be losing a potential claim because of New Mexico's legal rules. But if federal jurisdiction can expand to help out an Allendale in this way, there is no principled limitation to that expansion. No state law rule could long resist this kind of federal encroachment in the name of solving litigants' problems under valid state law.

Certiorari should be granted because only this Court can stop the Allendale suit and its threat to our federal system.

CONCLUSION

For all the reasons stated, Kaiser prays for the issuance of the writ of certiorari.

Respectfully submitted,

BRONSON, BRONSON & MCKINNON

By ELLIOT L. BIEN
Attorney of Record for
Petitioner Kaiser Engineers,
Division of Henry J. Kaiser
Company

Appendix A

United States Court of Appeals
Tenth Circuit

Publish

Allendale Mutual Insurance Company,
a Rhode Island corporation,
Plaintiff-Appellant,

v.

Kaiser Engineers, Division of Henry J. Kaiser Company;
Sergent Hauskins & Beckwith,
Defendants-Appellees.

[Filed Nov. 6, 1986]

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-83-1134-M)

Seth D. Montgomery (Katherine A. Weeks also of Montgomery & Andrews with him on the briefs), Santa Fe, New Mexico, for Plaintiff-Appellant.

Elliot L. Bien (Vernon L. Goodin and Stephen C. Tausz also of Bronson, Bronson & McKinnon with him on the brief), San Francisco, California, for Defendant-Appellee Kaiser Engineers, Division of Henry J. Kaiser Company.

Carl J. Butkus of Civerolo, Hansen & Wolf, Albuquerque, New Mexico, for Defendant-Appellee Sergent Hauskins & Beckwith.

Before HOLLOWAY, Chief Judge, LOGAN, Circuit Judge, and BRETT, District Judge.*

LOGAN, Circuit Judge.

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* The Honorable Thomas R. Brett, United States District Judge for the District of Oklahoma, sitting by designation.

The only issue on appeal in this diversity case is whether an "actual controversy" exists within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201, between an insurer and alleged third party tortfeasors in the following circumstances.

The plaintiff, Allendale Mutual Insurance Company, had insured United Nuclear Corporation's uranium mill in New Mexico. An earthen dam for the mill's tailing pond, built by defendants Kaiser Engineers and Sergent Hauskins & Beckwith, failed, causing huge losses. United Nuclear sought recovery for the loss from Allendale under the policy. Allendale denied that its policy provided coverage for this type of accident. United Nuclear then sued Allendale over the coverage in New Mexico state court and was awarded more than $24 million compensatory damages. While an appeal of the award was pending in the New Mexico Supreme Court, Allendale filed this diversity action in federal district court in New Mexico against defendants, seeking a declaratory judgment that, if held liable to United Nuclear, it would be entitled to judgment against defendants as subrogee of United Nuclear's claims. Allendale commenced this declaratory judgment action because it feared the four-year New Mexico statute of limitations would expire on its subrogation claim before the New Mexico Supreme Court rendered its decision on the appeal.[1]

The federal district court dismissed Allendale's action for lack of subject matter jurisdiction, ruling that the pending state court appeal prevented an actual controversy from existing between Allendale and the defendants. Allendale has appealed to this court; we now reverse and remand.

In dismissing Allendale's action, the district court stated the general rule that an insurance company acquires no subrogation interest in the claim of an insured until payment to the insured is

[1] While the present appeal was pending in this court, the New Mexico Supreme Court affirmed the $24 million compensatory damages award against Allendale but reversed a $25 million punitive damages award. *See United Nuclear Corp. v. Allendale Mutual Insurance Co.*, 103 N.M. 480, , 709 P.2d 649, 654-57 (1985).

made, citing *Meredith v. The Ionian Trader*, 279 F.2d 471, 474 (2d Cir. 1960), and *J.P. (Bum) Gibbons, Inc. v. Utah Home Fire Insurance Co.*, 202 F.2d 469, 473 (10th Cir. 1953). But in dismissing on this ground, the district court mistakenly equated the "actual controversy" requirement of the Declaratory Judgment Act, 28 U.S.C. § 2201, with the interest required to sue for damages as subrogee. Allendale would not have needed a declaratory judgment if it had already paid United Nuclear—it then could have sued defendants under fully ripened subrogation rights. By statute a declaratory judgment may be obtained "whether or not further relief is or could be sought." *Id.*

At least at the moment that the insurer has suffered a legal judgment requiring it to make payment to the insured, that insurer has a sufficient interest in recovery against third parties who allegedly caused the injury to create an actual controversy within the meaning of the Declaratory Judgment Act. The United States Supreme Court has stated the test for an actual controversy under 28 U.S.C. § 2201 as whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

The contingent nature of the right or obligation in controversy will not bar a litigant from seeking declaratory relief when the circumstances reveal a need for a present adjudication. *See, e.g., Seguros Tepeyac, S.A. v. Jernigan*, 410 F.2d 718, 729 (5th Cir.) (declaratory judgment appropriate to determine insurer's duty to reimburse insured for any future payments insured might make to judgment creditor). *cert. denied*, 396 U.S. 905 (1969); *West American Insurance Co. v. Allstate Insurance Co.*, 295 F.2d 513, 516 (10th Cir. 1961) (actual controversy existed between two insurance companies as to who had primary liability for any damages their mutual insured might be required to pay). In *Maryland Casualty Co. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941), a liability insurer brought a federal declaratory judgment action against its insured and an injured third party who had sued the insured in state court. In the federal action, the insurer sought

a judgment to the effect that it was not liable to defend or indemnify its insured. The injured third party argued that the complaint against him failed to state a cause of action because no actual controversy existed between him and the insurer. The Supreme Court held otherwise, noting that Ohio law gave the injured party "a statutory right to proceed against [the insurer] by suppplemental process and action if he obtains a final judgment against the insured which the latter does not satisfy within thirty days after its rendition." *Id.* at 273. Thus, an actual controversy existed between the insurer and the injured party even though the latter's claim against the insurer was contingent on (1) his obtaining a final judgment against the insured, and (2) the insured's failure to satisfy that judgment within thirty days.

The need for a declaratory adjudication of the controversy between the insurer and the injured party in *Maryland Casualty* arose from the potential for inconsistent federal and state interpretations of the insurance policy if the injured party was not joined in the federal action. *Id.* at 274. The running of a statute of limitations may also create a need for an adjudication of contingent rights and duties. In *Fidelity and Deposit Co. v. City of Sheboygan Falls*, 713 F.2d 1261 (7th Cir. 1983), a surety on a contractor's bond brought a declaratory judgment action against the contractor and the city for which the allegedly defective work had been performed. The complaint sought a declaration that (1) the surety was not liable on the bond because the contractor had not breached its agreement with the city, or (2) if the surety was liable on the bond, then it was entitled to indemnity from the contractor. The court noted that the surety's action in seeking a declaratory judgment was apparently motivated by its concern that the passage of time would bar its right to seek indemnity for any amount it might have to pay the city. This, the court held, was "the kind of interest that the Declaratory Judgment Act was intended to protect." *Id.* at 1265.

In the instant case a state court had rendered a legal judgment binding upon Allendale. Allendale, of course, had the right to appeal in an attempt to reverse that judgment. But, unless reversed, the judgment legally binds Allendale to pay more than $24 million to United Nuclear. Therefore, the controversy be-

tween Allendale and the defendants in this case is significantly less remote or contingent than the controversy between the insurer and the injured party in *Maryland Casualty*. *See Spivey Co. v. Travelers Insurance Cos.*, 407 F. Supp. 916, 917-18 (E.D. Pa. 1976) (party appealing judgment may seek declaratory judgment that its insurers are liable to indemnify it, despite possibility that judgment could be set aside on appeal). Moreover, a clear need exists for the present action, to determine the defendants' liability to United Nuclear or its subrogee, Allendale. If this action were not maintainable, Allendale would be forced to choose between giving up its right to appeal the state court award to its insured, and giving up its subrogation rights against the defendants.[2]

In *National Valve & Manufacturing Co. v. Grimshaw*, 181 F.2d 687 (10th Cir. 1950), we sustained a district court which had exercised its discretion to dismiss a contractor's claim for indemnity while appeal of the judgment against it was pending in state court. There was no indication in that case that a statute of limitations problem existed, or other circumstances revealed a need for immediate adjudication; the court's decision was upheld as not as an abuse of discretion in the circumstances of the case. That lack of any need for an early determination of the right to indemnification distinguishes *National Valve* from the case before us. But to the extent that we made statements there indicating that pendency of the appeal prevented an actual controversy from existing, we disapprove of them.

We recognize, of course, that in a case such as the one before us the district court will normally abate the proceedings until the state supreme court determines the appeal. We find, however, that the district court erred in holding that it lacked subject

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[2] Admittedly, Allendale could have avoided this predicament by impleading the defendants in the state court action. *see* N.M.R. Civ. P. 14(a) (1978) (permitting defendant to serve third-party complaint "upon a person not a party to the action who is *or may be* liable to him for all or part of the plaintiff's claim against him") (emphasis added). The third-party procedure is optional, however, and we see no reason to punish Allendale for choosing not to follow that course.

matter jurisdiction over this action during the pendency of the appeal. We therefore reverse and remand for further proceedings consistent with this opinion.

Appendix B

In The United States District Court
for the District of New Mexico

No. 83-1134-M Civil

Allendale Mutual Insurance Company,
a Rhode Island corporation, and
Appalachian Insurance Company,
a Rhode Island corporation,
Plaintiffs,

v.

Kaiser Engineers, Division of Henry J. Kaiser Company;
Sergent Hauskins & Beckwith,
Defendants.

[Filed Nov. 21, 1986]

Memorandum Opinion and Order

This matter comes on for consideration on plaintiffs' motion for an indefinite stay pending adjudication in the New Mexico Supreme Court of underlying litigation and defendants' motions to dismiss for lack of subject matter jurisdiction or alternatively for failure to state a claim. Having considered the motions and the briefs of counsel, I find plaintiffs' motion is not well taken and should be denied. I find defendants' motions to dismiss for lack of subject matter jurisdiction are well taken and they will be granted.

Plaintiffs in this case are two insurance companies: Allendale Mutual Insurance Company (Allendale) and Appalachian Insurance Company (Appalachian). Defendants are Sergent, Hauskins and Beckwith (Sergent) and Kaiser Engineers (Kaiser).

Allendale and Appalachian issued insurance policies to a non-party, UNC. UNC made claims against Allendale and the Appalachian under those policies for damages resulting from failure of a tailings dam. Allendale and Appalachian denied coverage. The coverage question was litigated in New Mexico State Court and judgment was entered May 27, 1983. The case is presently on

appeal to the New Mexico Supreme Court. The plaintiffs seek a declaratory judgment that if they are found to be liable to UNC under their contracts of insurance for damages arising out of the failure of the dam, the plaintiffs will be subrogated to UNC's claims against Sergent and Kaiser in the amount of each plaintiff's adjusted contractual liability.

The merits of a declaratory claim can only be determined if subject matter jurisdiction exists. *Amalgamated Sugar Co. v. Bergland,* 664 F.2d 818 (10th Cir. 1981). When there is no actual controversy, there is no subject matter jurisdiction does not exist. *Norvell v. Sangre de Cristo Dev. Co., Inc.,* 519 F.2d 370 (10th Cir. 1975).

The plaintiffs may have rights to assert against the defendants at some future date, however, there is no actual controversy at this time. The plaintiffs have made no payments to UNC and are denying any obligation to do so. An insurance company acquires no interest in the claim of an insured until it makes payment under the contract of insurance. *See J.P. (Bum) Gibbins, Inc. v. Utah Home Fire Ins. Co.,* 202 F.2d 469 (10th Cir. 1953), *Rhodes v. Lucero,* 79 N.M. 403, 444 P.2d 588 (1968). The mere anticipation that the insurer will become a subrogee in the future is insufficient. *Meredith v. The Ionian Trade,* 279 F.2d 471 (2d Cir. 1960)

Plaintiffs are not subrogees of UNC and they have no rights to assert against the defendants. Therefore, no actual controversy exists at this time and this court lacks subject matter jurisdiction. There is no authority for staying this case in the absence of jurisdiction. Now, Therefore,

IT IS ORDERED that plaintiffs' motion for an indefinite stay shall be, and hereby is, denied.

IT IS FURTHER ORDERED that defendant's motions to dismiss without prejudice for lack of subject matter jurisdiction shall be, and hereby are, granted.

EDWIN L. MECHEM
SENIOR UNITED STATES
DISTRICT JUDGE

Appendix C

NOVEMBER TERM—January 2, 1987

Before The Honorable William J. Holloway, and
The Honorable James K. Logan, Circuit Judges, and
The Honorable Thomas R. Brett*

No. 83-2671

Allendale Mutual Insurance Company,
a Rhode Island corporation,
Plaintiff-Appellant,

v.

Kaiser Engineers, Division of Henry J. Kaiser Company;
and Sergent Hauskins & Beckwith,
Defendants-Appellees.

This matter comes on for consideration of the petition for rehearing filed by the appellee Kaiser Engineers, and the petition for rehearing with suggestion for rehearing en banc filed by the appellees Hauskins and Beckwith.

Upon consideration whereof, the petitions for rehearing are denied by the panel to whom the case was argued and submitted.

The petitions for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/
ROBERT L. HOECKER, *Clerk*

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* Of the United States District Court for the Northern District of Oklahoma, sitting by designation.

Appendix D

In The United States Court of Appeals
For The Tenth Circuit

No. 83-2671

Allendale Mutual Insurance Company,
a Rhode Island corporation,
Plaintiff-Appellant,

vs.

Kaiser Engineers, Division of Henry J. Kaiser Company,
Sergent Hauskins & Beckwith,
Defendants-Appellees.

MOTION TO POSTPONE ORAL ARGUMENT

COMES NOW the plaintiff-appellant, Allendale Mutual Insurance Company, by and through its attorneys of record, Montgomery & Andrews, P.A., and moves this Court to enter an order postponing oral argument in this matter. As grounds therefor, plaintiff-appellant states:

1. This matter is currently assigned to Calendar B and listed for oral argument on Tuesday, August 6, 1985, at 9:00 a.m.

2. The only issue on this appeal is whether or not an insurer's complaint asserting subrogation rights against a tortfeasor after judgment against the insurer, while that judgment is on appeal and prior to the insurer's payment to its insured, raises a sufficient "actual controversy" to confer subject matter jurisdiction on a federal court under Article III of the Constitution and the Federal Declaratory Judgment Act.

3. The underlying judgment in this matter is on appeal with the New Mexico Supreme Court and was argued on May 27, 1984. A decision from the New Mexico Supreme Court should be imminent.

4. A decision in the principal case will potentially moot the issue before this Court and make oral argument unnecessary.

WHEREFORE, plaintiff-appellant respectfully requests that this Court enter its order postponing oral argument in this matter for a period of two months.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.

By SETH D. MONTGOMERY
Seth D. Montgomery
Post Office Box 2307
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(505) 982-3873

Attorneys for Appellants
Allendale Mutual
Insurance Company

Appendix E

[Letterhead]

December 12, 1985

Mr. Howard K. Phillips
Clerk of the Tenth Circuit
United States Court of Appeals
C 404 United States Courthouse
Denver, Colorado 80294

Re: Allendale Mutual Insurance Company v. Kaiser Engineers, Division of Henry J. Kaiser Company, et al.
Tenth Circuit Court of Appeals No. 83-3671

Dear Mr. Phillips:

The Supreme Court of New Mexico has now decided Allendale Mutual Insurance Company's Appeal from the state trial court's decision holding it liable to United Nuclear Corporation for compensatory and punitive damages under Allendale's insurance policy. In an opinion issued on October 15, 1985, the New Mexico Supreme Court affirmed the award of compensatory damages and pre-judgment interest, and reversed the award of punitive damages and attorney's fees.

We are enclosing copies of the opinion, styled *United Nuclear Corporation v. Allendale Mutual Insurance Company,* published in 24 N.M.S.B. Bull. 1163 (October 15, 1985). Rehearing was denied on December 5, 1985, and the Supreme Court has issued its mandate remanding the case to the trial court.

The instant action was brought in the United States District Court for the District of New Mexico after entry of the state trial court's judgment and after the judgment had been appealed to the state Supreme Court, seeking a declaratory judgment that, if the trial court judgment were affirmed and Allendale were ultimately held liable to United Nuclear for compensatory damages under the insurance policy, Allendale would be subrogated to United Nuclear's claims against the appellees as the parties allegedly responsible for the loss. The District Court dismissed the action, holding that there was no "actual controversy" between Allendale

and the appellees and that the Court therefore lacked jurisdiction. The enclosed opinion affirms the judgment for compensatory damages, and the judgment is now therefore final.

Thank you for your attention to this matter.

Very truly yours,

/s/ SETH D. MONTGOMERY

SDM:rlr
Enclosures
8879-83-01
cc: Carl Butkus, Esquire
Vernon Goodin, Esquire
Eliot Bien, Esquire
Richard Yeomans, Esquire
H. William Fox, Esquire